Supreme Court, U. S.
FILED
NOV 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-829

FIRST JERSEY SECURITIES, INC., a Corporation of the State of New Jersey; ROBERT E. BRENNAN; JOSEPH GALLIGAN; JACK MONDEL; CHARLES OEHLERT; JOHN DELL; MICHAEL ZUDONYI; and ANTHONY NADINO,

Petitioners,

vs.

HONORABLE VINCENT P. BIUNNO, Judge, United States District Court
Respondent
(GEORGE J. BERGEN, individually and in his official capacity; and NATIONAL ASSOCIATION OF SECURITIES DEALERS, a Corporation of the State of Delaware,
Real Parties in Interest)

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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November 26, 1979

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

FIRST JERSEY SECURITIES, INC., a Corporation of the State of New Jersey; ROBERT E. BRENNAN; JOSEPH GALLIGAN; JACK MONDEL; CHARLES OEHLERT; JOHN DELL; MICHAEL ZUDONYI; and ANTHONY NADINO,

Petitioners,

vs.

GEORGE J. BERGEN, individually and in his official capacity; and NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., a Corporation of the State of Delaware,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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The petitioners, First Jersey Securities, Inc., Robert E. Brennan, Joseph Galligan, Jack Mondel, Charles Oehlert, John Dell, Michael Zudonyi, and Anthony Nadino, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 29, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet officially reported, appears at Appendix E hereto, p. 36a *et seq.*, and at 1979 CCH Federal Securities Law Reporter, ¶97, 106, p. 96, 135. The opinion of the United States District Court for the District of New Jersey, not reported, appears at Appendix C, p. 5a *et seq.*

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on August 29, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is a federal suit claiming violations of Due Process by a quasi-federal agency in a pending disciplinary proceeding subject to immediate dismissal for failure to exhaust administrative remedies, even though a substantial and uncontested showing of constitutional abuses by the agency is made?

2. Can a court of appeals issue a writ of mandamus to reverse a district court's decision to retain its acknowledged jurisdiction over a challenge to an administrative proceeding because the court of appeals views as erroneous the district court's manner of applying the discretionary doctrine of exhaustion of administrative remedies to the facts of the case?

3. Can a federal licensee who has made a verified *prima facie* showing of abuses and bias in a pending administrative disciplinary proceeding be denied the right to

discovery in a federal district court on its claims, particularly where no right of discovery exists at the administrative level or in the court of appeals on review?

4. Is it contrary to the exclusive federal district court jurisdiction provided by 15 U.S.C. §78aa to dismiss a challenge to a proceeding pending before the National Association of Securities Dealers where a verified *prima facie* showing has been made demonstrating violations of the Securities Exchange Act by the National Association of Securities Dealers in connection with the pending proceeding?

5. Is the Maloney Act, 15 U.S.C. §78o-3, unconstitutional because it allows a private panel of securities dealers to judge the conduct of their competitors and to effectively prevent their competitors from engaging in the securities business?

6. Does the 1975 amendment to the Securities Exchange Act, which removed the right to *de novo* fact-finding in the SEC on review of a NASD disciplinary action, result in an unconstitutional delegation of federal administrative powers to a private association of industry competitors?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 15, §78o-3

United States Code, Title 15, §78s

United States Code, Title 15, §78y

United States Code, Title 15, §78aa

Pertinent sections of these statutes are set forth at length in Appendix I hereto at p. 66a *et seq.*

STATEMENT UNDER RULE 33(2)(b)

Since this proceeding draws into question the constitutionality of the Act of June 6, 1934, as added June 25, 1938, 52 Stat. 1070, and as amended by the Act of June 4, 1975, 89 Stat. 127, 15 U.S.C. §78o-3, and of the Act of June 6, 1934, 48 Stat. 898, as amended by the Act of June 4, 1975, 89 Stat. 146, 15 U.S.C. §78s, Acts of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. §2403(a) may be applicable.

No court of the United States as defined by 28 U.S.C. §451 has, pursuant to 28 U.S.C. §2403(a), certified to the Attorney General the fact that the constitutionality of such Acts of Congress have been drawn into question.

STATEMENT OF THE CASE

This proceeding was initiated by the petitioners (sometimes collectively referred to herein as "First Jersey") in the United States District Court for the District of New Jersey on April 17, 1979, by a verified complaint seeking damages and an order enjoining a disciplinary proceeding brought against them by respondent National Association of Securities Dealers, Inc. ("NASD"). The jurisdiction of the district court was invoked under 28 U.S.C. §1331 (general federal question jurisdiction), and under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa (granting exclusive jurisdiction to the district courts over violations of the Securities Exchange Act and the rules and regulations thereunder).

Petitioner First Jersey Securities, Inc. is a broker and dealer in securities registered with the Securities and Exchange Commission ("SEC"), and is a member of the

NASD. The other petitioners are all officers or employees of First Jersey, and are also registered with the SEC and are members of the NASD. Respondent NASD is the only national securities association registered under the Maloney Act, 15 U.S.C. §78o-3, and is the only "self-regulatory" agency in the "over-the-counter" securities industry. Respondent George J. Bergen is the vice-president of the NASD and is the District Director of NASD District 12, which governs New York City and the surrounding area.

First Jersey's verified complaint alleged that the NASD and Bergen were violating First Jersey's federal and state constitutional rights to Due Process, including the right to a fair hearing before an impartial tribunal and to effective assistance of counsel, as well as its rights to a fair procedure under the Maloney Act and under the federal Administrative Procedure Act, 5 U.S.C. §554. First Jersey's action stemmed from an NASD investigative proceeding which had resulted in the filing of an administrative complaint against petitioners by the District 12 Business Conduct Committee of the NASD. At the time the district court complaint was filed, the NASD proceeding was in the prehearing stage. It remains at that stage today. The NASD complaint charged that First Jersey had violated NASD rules, and can result in the expulsion of First Jersey from membership in the NASD. Expulsion from the NASD effectively means disqualification from engaging in the securities business.[1]

In the verified complaint in the district court, First Jersey alleged facts concerning the manner and means by which the NASD District 12 investigation was pursued

1. See §25 of the NASD Rules of Fair Practice; interpretation of Board of Governors, ¶2301, NASD Manual.

and the procedure by which the administrative complaint was filed. The facts were verified by petitioner Brennan, First Jersey's president, and supported by affidavits of First Jersey's attorney and of third parties who had been threatened with reprisals by NASD employees if they did not cooperate in building a case against petitioners. These facts were developed later through sworn deposition testimony, most of it from NASD employees. That discovery, initially resisted by the NASD, began on April 26 but was ordered terminated by the Court of Appeals on May 21 (see order at pp. 3a-4a, Appendix B hereto). It revealed numerous other statutory and constitutional abuses in the NASD proceeding previously unknown to First Jersey.

The verified complaint and supporting affidavits alleged *inter alia*:

(1) that the members of the NASD panel which was to hear the administrative complaint had been hand-picked by the chief investigator, Bergen, in violation of NASD rules;

(2) that Bergen had made *ex parte* statements to the hearing panel members and others indicating a personal bias against First Jersey and petitioner Brennan, and exerted an undue influence over the panel members;

(3) that NASD investigators had threatened prospective witnesses with reprisals if they did not provide evidence against First Jersey;

(4) that First Jersey had been denied a reasonable opportunity to defend the complaint and had been denied effective assistance of counsel;

(5) that the competitor-dominated NASD could not provide a fair tribunal;

(6) that the District 12 tribunal had combined investigative, prosecutorial and adjudicative functions in an impermissible manner; and

(7) that the NASD was operating under an unconstitutional delegation of governmental powers.

The interrupted and abbreviated discovery revealed *inter alia* the following additional facts:

(1) that an unprecedented secret prosecutor's report, containing conclusions that petitioners had committed fraud and NASD rule violations, had been circulated to the District 12 committee members who were to hear the charges in the complaint;

(2) that two of the three hearing-panel members chosen by Bergen had the same employer as several of the prospective NASD witnesses against First Jersey;

(3) that NASD investigators had leaked information concerning the confidential NASD complaint to the press, resulting in prejudicial articles in the national press;

(4) that the NASD had conducted secret *ex parte* post-complaint depositions of prospective witnesses;

(5) that the NASD investigation was deliberately one-sided and focused only on witnesses presumed to be unfavorable to First Jersey; and

(6) that evidence discovered which was favorable to First Jersey was withheld from it.

The facts alleged and discovered by First Jersey were never controverted by either respondent, nor were they contested at a three-day plenary hearing in the district court, where respondents rested without calling any witnesses. These facts were found by the district court,

who heard testimony and examined the discovery record, to raise a "serious" and "substantial challenge" to the NASD proceeding, which that court described as "more like trial by combat than hearing by fair procedure" (slip opinion, pp. 23a, 24a, 25a, Appendix C hereto).

The plenary hearing took place under an expedited schedule ordered by the Court of Appeals (order of May 15, at p. 1a). The district court had before it the NASD's motion to dismiss the complaint and First Jersey's application for a preliminary injunction. In a reasoned opinion covering forty pages of transcript, the district court on June 4 concluded that First Jersey had made a showing sufficient to warrant retention of jurisdiction and not invocation of the doctrine of exhaustion of administrative remedies at that time (slip opinion, p. 29a). The court also indicated that, "[e]xcept for recent developments", it had been inclined "on the interrupted record to seriously consider the grant of a preliminary injunction as proper, at least for a limited period" (p. 23a).[2] Under the circumstances, however, it also denied the application for an injunction without prejudice. (The district court's order denying both motions is included at p. 34a, Appendix D hereto.)[3]

2. The recent developments referred to were: (1) the filing two weeks earlier of an SEC administrative complaint against several of the petitioners containing allegations similar to some of those in the NASD complaint (p. 25a); and (2) the NASD announcement at the plenary hearing of a decision to transfer the pending proceeding to NASD District 8 in Chicago (p. 26a). The district court assumed that a hearing on the SEC complaint would precede any NASD action in District 8, and that steps could and would be taken to insulate the District 8 panel from many of the deficiencies existing in the District 12 proceeding (pp. 26a-29a). On that basis, the district court found "no reasonable likelihood of immediate and irreparable harm" warranting issuance of injunctive relief (p. 29a).

3. The district court also denied after oral argument a motion by respondents to certify an interlocutory appeal under 28 U.S.C. §1292(b) (Transcript of June 7, 1979; Order of June 12, 1979).

Two petitions for mandamus filed by respondents were pending before the Court of Appeals while the district court was hearing and considering the parties' motions. Substantial briefs on the petitions had already been filed by order of the Court of Appeals before the district court's June 4 decision. On August 29 the Court of Appeals granted one of NASD's petitions, and ordered the district court to dismiss the case for lack of jurisdiction (Judgments, p. 61a; Writ of Mandamus, p. 63a).

The appellate court's ruling was based on the district court's decision not to apply the exhaustion of administrative remedies doctrine. *The Court of Appeals did not consider the discovery record or the facts adduced at the district court hearing.* It held that there should have been no discovery, and that the district court was without jurisdiction, despite the applicability of 28 U.S.C. §1331 and 15 U.S.C. §78aa, because the verified complaint did not allege a sufficiently "clear and unambiguous" constitutional violation, nor any irreparable injury (slip opinion, pp. 42a-43a, 46a). The Court distinguished this Court's decision in *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978), reasoning that it did not bar mandamus because a district court's discretion in deciding whether the exhaustion doctrine supports a deferral to pending administrative proceedings is more "limited" than that involved in *Calvert Fire Insurance Co., i.e.*, in deciding whether the crowded state of the district court docket can support a deferral to pending state judicial proceedings (pp. 56a-57a).[4]

4. One reason advanced by the Court of Appeals to support its writ here, however, was the writ's "practical benefits . . . to improve judicial administration," in light of "the competing demands on the district court's time and its heavy calendar . . . [in the] 'era of excessively crowded lower court dockets'" (p. 58a).

Two of First Jersey's constitutional challenges, that of the NASD tribunal's inherent partiality due to its members' pecuniary interest as First Jersey's competitors, and that of improper delegation of governmental powers to the NASD, were addressed briefly and rejected by the Court of Appeals without reference to any supporting facts of record, statutes, rules or case law (pp. 48a-52a).[5]

There as yet has been no hearing on the NASD complaint against petitioners. No hearing date is presently scheduled. The NASD has indicated, however, that it will schedule a hearing, and that certain of the assumptions of the district court underlying its denial of an injunction (NASD deferral to the parallel SEC proceedings and insulation of the District 8 panel from the District 12 abuses), may be "inconsistent with NASD's assumptions".[6] Even assuming that all the district court assumptions precluding an injunction were fulfilled, the controversy regarding the jurisdiction of the district court and the inherent defects in the NASD's disciplinary procedures would remain.

5. The Court of Appeals opinion states that the issue of the NASD panel members' pecuniary interest as competitors of First Jersey was not raised by petitioners until after oral argument in that Court (p. 49a). In fact, the issue was raised in the verified complaint (First Count, ¶8) and was argued extensively in briefs submitted to the district court.

6. See NASD counsel's letter to the district court dated June 12, 1979 and responding letter of First Jersey's counsel dated June 20, 1979; and see NASD attorney Kilkenny's letter of September 4, 1979.

REASONS FOR GRANTING THE WRIT

1

The Issuance Of A Writ Of Mandamus To Correct A Perceived Abuse Of Discretion By The District Court Conflicts With Controlling Decisions Of This Court, Will Have Serious Impact On Future Discretionary Decisions, And Will Improperly Expand The Availability And Scope Of Appellate Review.

This Court in its recent decision in *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978), clearly held that the issuance of a writ of mandamus to correct a perceived abuse of discretion in a district court interlocutory order is improper. The Court of Appeals issued just such a writ in this case. All that was before the Court of Appeals was the district court's denial of the NASD's motion to dismiss, and the district court's refusal to grant an injunction, neither an appealable final order. The district court's decision to retain jurisdiction, at least temporarily, over First Jersey's complaint was based on a careful exercise of its discretion in determining whether to apply the doctrine of exhaustion of administrative remedies. That such a decision is discretionary is well-established by decisions of this Court. *See, e.g., N.L.R.B. v. Shipbuilding Local 22*, 391 U.S. 418, 426n8 (1968); *Natural Gas Pipeline Co. v. Slattery*, 302 U.S. 300, 311 (1937).

Although this Court spoke categorically in the *Calvert Fire Insurance Co.* case on this issue, the Court of Appeals thought that *Calvert* only "may have limited the availability of mandamus" to correct abuses of discretion by a lower court (slip opinion at p. 56a). It seemed to see some continued support in *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957) for corrective use of the writ in

discretionary contexts, despite this Court's later decision in *Will v. United States*, 389 U.S. 90 (1967) *(id.)*. In that case, the Court noted that *LaBuy* was "simply inapposite where there is no showing of a persistent disregard of the federal rules." 389 U.S. at 104n14. No such disregard was present in this case. The Court of Appeals here was apparently misled, just as was the court of appeals in *Will v. United States*, by the "semantic fallacy" that the district court was without "jurisdiction" because in its view a proper exercise of discretion under the exhaustion doctrine should have resulted in dismissal. 389 U.S. at 98-99 and at 98n6; *Will v. Calvert Fire Insurance Co.*, 437 U.S. at 665n7; and compare the Court of Appeals opinion below at pp. 38a, 42a, 54a-55a, 56a, 57a.

The Court of Appeals also insisted, despite the holding of *Will v. Calvert Fire Insurance Co.*, 437 U.S. at 665-666, that the "right to mandamus can be clear and indisputable" where the district court decision challenged is one within its "limited discretion" and is "closely restricted by well-defined legal principles." (slip opinion, p. 57a). No other court of appeals has presumed to so restrictively read the *Calvert Fire Insurance Co.* decision. See, *e.g. United States v. Watson*, 603 F.2d 192, 195-197 (C.C.P.A. 1979); *In re United States*, 598 F.2d 233, 236-238 (D.C. Cir. 1979); *Union Light Heat & Power Co. v. U.S. District Court*, 588 F.2d 543, 544 (6th Cir. 1978), *cert. dismissed*, — U.S. — (1979). The unwarranted modification here of the Court's ruling in the *Calvert Fire Insurance Co.* case seriously undercuts its effect, and undermines the statutory bar on interlocutory appeals. It represents a significant and improper expansion of appellate jurisdiction to immediately review any district court decision having any element of discretion, which prospect itself may well inhibit thoughtful exercise of the district court's

equitable jurisdiction in the future, and encourage safe district court rulings mechanically applying the perceived "well-defined legal principles".

Nor can the decision of the Court of Appeals be justified even under its own rationale, since the doctrine of exhaustion of administrative remedies hardly leaves a "limited" range of discretion to the district court, nor are the legal principles involved so "well-defined." See, *e.g.*, 3 Davis, *Administrative Law* (1958), Chapter 20, p. 56 *et seq.*; *American Airlines v. Forman*, 204 F.2d 230 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953). Here the district court's exercise of discretion was careful and considered, and should not have been "second-guessed" by the Court of Appeals. See, *e.g., National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642 (1976); *In re Cleland*, 218 U.S. 120, 122 (1910).

These conflicts with applicable decisions of this Court, and the serious effect they will have, justify the grant of certiorari to review the judgment below.

2

The Dismissal On Mandamus Of Petitioners' Uncontroverted Claims Of Substantial Constitutional And Statutory Defects In The NASD Proceeding Effectively Closes The Federal Courts To Any Such Challenges To Federal Agency Action, A Result Which Should Be Clearly Condemned By This Court.

The Court of Appeals inconsistently ruled that while a federal challenge to a pending unconstitutional *state* administrative proceeding is not barred by the doctrine of exhaustion of remedies, the same challenge to a similarly unconstitutional *federal* agency proceeding, such as here, is barred under the exhaustion doctrine. Such an

anomalous result, though clearly of substantial importance, has yet to be directly rejected by this Court. *This case presents a clear-cut opportunity for this Court to decide this issue and its collateral questions in a proper factual context.*

One aspect of this issue is the present unavailability of a judicial exception to the exhaustion doctrine in a federal agency context which would parallel the jurisdiction exception to the exhaustion doctrine existing under 42 U.S.C. §1983 in a state agency context. See, *e.g., Gibson v. Berryhill,* 411 U.S. 564, 574 (1973); Court of Appeals slip opinion at p. 52a, note 5. Some older decisions of this Court suggest the propriety of such a federal agency exception to exhaustion of administrative remedies. See, *e.g., Public Utilities Comm. v. United States,* 355 U.S. 534, 539-540 (1958); *Aircraft & Diesel Equipment Corp. v. Hirsch,* 331 U.S. 752, 773n38 (1947); *Steele v. Louisville & Nashville R.R. Co.,* 323 U.S. 192, 206-207 (1944). The courts of appeals of the various circuits which have considered aspects of the question are not in accord. Contrast the instant case and *Sanders v. McCrady,* 537 F.2d 1199, 1200-1201 (4th Cir. 1976), with *Fitzgerald v. Hampton,* 467 F.2d 755, 768-769 (D.C. Cir. 1972), and *Fay v. Douds,* 172 F.2d 720, 723 (2d Cir. 1949).

Another aspect of the exhaustion issue concerns the statutorily mandated exclusive jurisdiction in the district courts over violations of the Securities Exchange Act under 15 U.S.C. §78aa (Appendix I, p. 78a). The NASD has a statutory duty under the Maloney Act, 15 U.S.C. §78o-3 (Appendix I, p. 66a), to provide a "fair procedure for the discipline of [its] members". Failure to do so gives rise to an action for an injunction or damages cognizable *only* in the federal district court. 15 U.S.C. §78aa. Such failure was alleged, supported and uncontroverted in this case.

Nevertheless, the Court of Appeals, without citation, "reject[ed] the notion that [15 U.S.C. §78aa] conclusively established jurisdiction in this case" (slip opinion at p. 42a) because of the applicability of the exhaustion doctrine. The Court of Appeals noted the availability of "judicial review" from final agency action (p. 43a, 52a), which is lodged exclusively in the *court of appeals* under 15 U.S.C. §78y(a) (Appendix I, p. 75a). In this respect, the Court of Appeals decision is in conflict with this Court's decision in *Leedom v. Kyne,* 358 U.S. 184 (1958), and improperly thwarts exercise of the district court's exclusive original jurisdiction to redress violations of the Securities Exchange Act under 15 U.S.C. §78aa. *Merrill Lynch, etc. v. Nat. Ass'n of Securities Dealers,* 343 F. Supp. 591 (N.D. Tex. 1977), *app. pending.*

Moreover, the action of the Court of Appeals has practical implications which seriously compound the legal and jurisdictional error involved, because it forecloses all opportunity for a victim of unconstitutional or statutory abuses by a federal agency to obtain any discovery into those abuses. An NASD member facing a disciplinary hearing has no right to discovery at either the NASD or the SEC-review level, nor in the Court of Appeals after a final ruling. That right is only available in the district court. But the Court of Appeals has ruled that the district court must not allow any discovery, and must immediately dismiss any challenge to a pending federal agency proceeding unless the plaintiff can demonstrate a "clear and unambiguous constitutional violation" (54a-55a, 56a), which the Court of Appeals itself acknowledges can require "extensive discovery and evidentiary hearings" to establish (53a-54a). The "catch-22" nature of such a ruling insulates all but the most obvious known administrative abuses from scrutiny, and closes the district courts and the benefits of the discovery rules to those who need them most, the vic-

tims of agency abuse who have less than overwhelming proof at the time the complaint is filed.

Ironically, the Court of Appeals ignored the fact that First Jersey's allegations were initially supported by affidavits, and later by deposition testimony of NASD employees, that they were never controverted or even contested at the district court hearing, and that they included constitutional violations which had already occurred.[7] It ignored the extensive factual review in the district court opinion. It ignored the fact that the SEC, the reviewing agency here, was itself conducting proceedings against several of the petitioners. Under these circumstances, where First Jersey's substantial claims were ordered dismissed, it is difficult to conceive of *any* federal agency abuse case which a district court in the Third Circuit would entertain in the future.

The serious adverse effect of the Court of Appeals' ruling, and the importance of protecting proper access to the federal courts and its processes, justify the grant of certiorari to review the judgment below.

3

There Are Serious Constitutional Infirmities In The NASD Disciplinary Process Which This Court Has Never Addressed, And Which Are Especially Important In The Unique Context Of Self-Regulation In The Securities Industry.

Apart from the numerous areas of actual bias and specific constitutional and statutory violations by the NASD which were adduced below, First Jersey also alleged inherent constitutional defects in the disciplinary aspect of

7. The Court of Appeals opinion contains the startling statement that no constitutional violation "occurs" until a "specific deprivation of liberty or property" occurs, which in turn "would only occur if and when sanctions are imposed by the NASD and upheld through all levels of review" (slip opinion, p. 54a).

the unique NASD "self regulatory" system. For the most part, they were never reached or relied on by the district court, but were addressed and rejected by the Court of Appeals. These constitutional defects have resulted in petitioners' livelihood being placed initially in the hands of their business competitors, not a federal agency, who could very well be the sole fact-finder in the disciplinary process.

This Court has recently considered similar cases involving competitor-professional self-regulation in state agency contexts. *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Wall v. American Optometric Association*, 379 F. Supp. 175 (N.D. Ga.), *summarily aff'd sub nom. Wall v. Hardwick*, 419 U.S. 888 (1974). In those cases, the Court held that the adjudicatory aspect of competitor regulation violated the right to a fair and impartial tribunal due to the possibility of bias deriving from the competitor judge's indirect financial stake in the outcome of disciplinary proceedings. *Friedman v. Rogers*, 440 U.S. 1, 18 (1979). While the Court has not considered whether NASD disciplinary procedures specifically are suspect, it has noted that the Securities Exchange Act "affords no justification for anti-competitive collective action taken without fair procedures." *Silver v. New York Stock Exchange*, 373 U.S. 341, 364 (1963). In both *Gibson* and *Wall*, this Court agreed with the district court assessments as to the improper pecuniary interests inherent in the competitor-panels involved. Here there was no opportunity for district court findings on this issue; there was only a ruling on it in the abstract by the Court of Appeals.

Interrelated with the competitor-regulation defect in the NASD proceeding, and aggravating it, is the impact of the 1975 amendment to the Securities Exchange Act, which removed the right of an NASD member to *de novo*

fact-finding on SEC review of an adverse NASD ruling. Compare the former 15 U.S.C. §78o-3, with the present 15 U.S.C. §78s(e)(1) (Appendix I, p. 71a). The effect of that amendment is the unconstitutional delegation of power by Congress from the government agency charged with the ultimate regulatory responsibility, the SEC, to a private industry association of interested competitors. A similar delegation was condemned in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). The amendment also has the ancillary result of causing the improper by-pass of the Administrative Procedure Act safeguard requiring an independent, impartial hearing examiner for federal agencies (5 U.S.C. §556, §1305), since it effectively transforms the NASD into the SEC's hearing examiner in a whole class of disciplinary cases. See, *e.g.*, *U.S. Health Club, Inc. v. Major*, 292 F.2d 665, 667 (3d Cir.), *cert. denied*, 368 U.S. 896 (1961); *Borg-Johnson Electronics, Inc. v. Christenberry*, 169 F. Supp. 746, 754 (S.D.N.Y. 1959).

Further, the record in this case, as detailed in part in the opinion of the district court, revealed that the inherent pecuniary interest of the NASD panel was aggravated by the combination within it of investigative, prosecutorial and adjudicative functions under circumstances not faced by the Court in *Withrow v. Larkin*, 421 U.S. 35 (1975), but similar to those condemned by the courts in *Amos Treat & Co. v. S.E.C.*, 113 U.S. App. D.C. 100, 306 F.2d 260 (1972) and other cases. *Withrow*, 421 U.S. at 50n16. Such combination of inconsistent functions here is of critical significance, since the SEC has stated that "a rigid separation between investigative and adjudicative personnel . . . is an essential element of fairness in NASD proceedings at the district business conduct committee level." *In re Cotzin*, CCH Federal Securities Law Reporter, 1973-1974 Transfer Binder, ¶79,827, p. 84,232 at p. 84,236.

The importance of a thoughtful consideration of these constitutional issues here is underscored by the fact that the NASD is the sole private association involved in the "self-regulation" or "cooperative regulation" experiment in the over-the-counter securities market. See Loss, *Securities Regulation*, Ch. 8C, p. 1359 *et seq.* and p. 3448 *et seq.* The Court of Appeals for the Third Circuit has itself observed that the NASD self-regulatory mechanism "is a departure from the traditional governmental exercise of enforcement power in the first instance," making "meticulous compliance" by the NASD with high standards of procedural fairness of prime concern. *Todd & Co. v. Securities & Exchange Comm.*, 557 F.2d 1008, 1041 (3d Cir. 1977). The SEC has noted also that "[u]nless district business conduct committees maintain high standards of justice and fair play, the whole NASD program may fall into disrepute." *Sherman Gleason*, 15 SEC 639, 648-649 (1944). See Lowenfels, *A Lack of Fair Procedures in the Administrative Process: Disciplinary Proceedings at the Stock Exchanges and the NASD*, 64 Cornell L. Rev. 375 (1978).

These serious constitutional issues and their impact on the NASD-SEC regulatory process justify the grant of certiorari in this case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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DATED: November 26, 1979.